



BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Forward Energy LLC for a Certificate of Public Convenience and Necessity to Construct a Wind Electric Generation Facility and Associated High Voltage Electric Transmission Facilities, to be Located in Dodge and Fond du Lac Counties	9300-CE-100
Application of Ledge Wind Energy, LLC for a Certificate of Public Convenience and Necessity to construct a 150 MW Wind Electric Generation Facility and Associated Facilities, to be located in the Towns of Morrison, Holland, Wrightstown and Glenmore, Brown County	9554-CE-100
Complaint of Ann Wirtz and Jason Wirtz v. Invenergy LLC	9554-EI-100

ORDER

Introduction

On July 14, 2005, the Commission granted a Certificate of Public Convenience and Necessity (CPCN) to Forward Energy LLC in docket 9300-CE-100, authorizing it to construct and operate a wind energy facility in the Fond du Lac area. Forward Energy LLC completed the project, which is known as the Forward Wind Energy Center (FWEC), and it began operation in 2008. On April 1, 2010, Ann and Jason Wirtz filed a Complaint with the Commission about the operation of FWEC. The Wirtzes lived in the FWEC project area until September 2009. Their Complaint alleges that FWEC inflicted a number of serious health and financial impacts on them, and the Wirtzes are seeking a Commission order awarding damages.

The Wirtzes ask that the Commission commence a new contested case hearing under Wis. Stat. § 227.42, that the Commission grant them the right to intervene in the FWEC proceeding, docket 9300-CE-100, or that the Commission grant them a hearing in a pending

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proceeding for a new wind energy facility. This new wind facility is known as the Ledge Wind Energy Project, sponsored by Ledge Wind Energy LLC, and located in Brown County. The application for this facility has been assigned docket number 9554-CE-100. Both Forward Energy LLC and Ledge Wind Energy LLC are subsidiaries of Invenergy LLC. The purpose of the proceedings that the Wirtzes are requesting is to prove the harm they have alleged so the Commission will require Forward Energy LLC or Invenergy LLC to provide compensation.

The Wirtzes' Complaint only seeks compensation from Invenergy LLC, but the Commission notes that the owner of FWEC is actually Forward Energy LLC, which is a limited liability company. For the purposes of this Order, the Commission presumes that Invenergy LLC is the parent company and the single member of Forward Energy LLC. Under Wis. Stat. § 183.0304(1), the debts, obligations, and liabilities of a limited liability company, "whether arising in contract, tort, or otherwise," are solely the responsibility of that company and not of its members or managers. This means, if the Commission's presumption is correct, the Wirtzes should be seeking damages from Forward Energy LLC and not from Invenergy LLC. However, Invenergy LLC did not argue as an affirmative defense that the Complaint was filed against the wrong company. Rather than request that the Wirtzes amend their pleadings, the Commission will read their Complaint as a demand for relief from either Invenergy LLC or Forward Energy LLC.

Invenergy LLC responded to the Wirtz Complaint on April 21, 2010. The Wirtzes then submitted a reply on April 22, 2010, which they supplemented with a letter on May 6, 2010.

The Wirtzes allege that living within the FWEC project area harmed their health, damaged a breeding herd of alpacas that they were raising as a business, and ultimately forced

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them to abandon their home. In their letter to the Commission of May 6, 2010, the Wirtzes affirm that at a recent sheriff's sale the bank purchased their home in foreclosure at a price allegedly substantially below its appraised value.¹

The Commission deliberated on the Wirtzes' Complaint at its open meeting on May 27, 2010.

Opinion

Right to a new hearing

The Wirtz family first argues that, pursuant to Wis. Stat. § 227.42, it has a right to a hearing in a contested case docket. Wisconsin Stat. § 227.42(1) establishes four conditions that a requester must meet. They are:

227.42 Right to hearing. (1) In addition to any other right provided by law, any person filing a written request with an agency for hearing shall have the right to a hearing which shall be treated as a contested case if:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and
- (d) There is a dispute of material fact.

The Wirtzes contend that their health and their property losses are substantial interests, injured by the action of the Commission when it granted a CPCN for FWEC in 2005. They also allege that they meet the other three conditions of this statute. Invenenergy LLC, however,

¹ The Commission interprets the Wirtzes' Complaint as a request to open a docket under Wis. Admin. Code § PSC 2.07. As Invenenergy LLC properly points out, this rule only contemplates the filing of a request and a response and does not provide an opportunity for the requester to file replies. *See* Wis. Admin. Code § PSC 2.07(1) and (4). Because the Wirtzes' replies raise no new arguments, however, and because Invenenergy LLC indicated that it did not need to file any additional responsive materials, for this proceeding the Commission will accept the Wirtzes' extra filings of April 22, and May 6, 2010.

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disputes whether the Commission can protect these interests. It maintains that the Commission has no jurisdiction over personal injury or property damage claims emanating from a facility for which the Commission granted a CPCN.

The Wisconsin Supreme Court has declared that the Commission lacks the authority to provide compensation for personal and property losses. In *Waukesha Gas & Electric Co. v. Waukesha Motor Co.*, 175 Wis. 420, 426-27, 184 N.W. 702 (1921), the supreme court considered a fact situation where a party alleged that it was harmed by a utility's failure to fulfill "its agreements and obligations" to furnish utility services. The supreme court ruled that the judicial branch, not the Commission (then called the Railroad Commission), is the proper forum for actions seeking damages. It held:

Now we ask where the power is vested in the Railroad Commission to determine the issue thus presented, or grant relief for the wrong and damages sustained? It is true that the Railroad Commission has a supervisory and regulatory control over the public utilities of this state in the matter of prescribing reasonable rates and fixing standards of adequate service. But its orders in such respect relate solely to the future. It has no power to redress any wrongs or grievances arising from the past conduct of the utility. In this case the findings of the Railroad Commission can be of no assistance to the court. The obligations of the utility are measured by the terms of its contract with the defendant. If that is a valid contract, and we now are so assuming, the only issue to be determined is whether there was a breach thereof on the part of the utility and the amount of the damages sustained because of such breach. This is a judicial question, pure and simple. It is a wrong sustained by the defendant which the Railroad Commission has no power to redress, neither can it be of any assistance to the courts in determining the rights of the parties.

See also Madregano v. Wisconsin Gas & Electric Co., 181 Wis. 611, 618, 195 N.W. 861 (1923), where the supreme court held: "When reasonable rates and rules or regulations have been established, the enforcement of rights of parties in relation thereto presents matters which are properly a subject for judicial inquiry."

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The Wirtzes' allegation is that FWEC caused personal injuries, rather than a breach of contract. Yet a personal injury claim is a tort or a nuisance action, and these are also matters for judicial inquiry. As stated in article VII, § 8, of the Wisconsin Constitution, "Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state and such appellate jurisdiction in the circuit as the legislature may prescribe by law." Furthermore, state law provides evidence of the Legislature's intent that a private cause of action like the Wirtzes' Complaint must be handled in circuit court, not by the Commission. As Wis. Stat. §801.02(1) declares, "[A] civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court"

The broad authority of circuit courts contrasts with the limited authority of an administrative agency. For example, in *Nekoosa-Edwards Paper Co. v. Public Service Commission*, 8 Wis. 2d 582, 99 N.W.2d 821 (1959), the supreme court held that the Commission had no jurisdiction to determine the rights of riparian owners who claimed that a proposed diversion of water from a navigable stream would injure them. It ruled:

The Public Service Commission is an administrative body created by the legislature and possesses neither legislative nor judicial functions. . . . Administrative boards and commissions have no common law power. Their powers are limited by the statute conferring such powers expressly or by fair implication.

Id. at 593.

The Wirtzes disagree that the Commission's jurisdiction is so constrained. They contend that the Commission does have the authority to order compensation and that the Commission has used that authority. They point to Condition 38 of the FWEC Final Decision, which states:

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“Forward shall compensate landowners for crop loss caused by construction activities.” The Wirtzes also note that when the Commission examines a CPCN application, state law requires it to consider whether the project will cause “individual hardships.” *See* Wis. Stat. § 196.491(3)(d)3.

The question now before the Commission, though, is not whether it can impose conditions when it issues an order approving a new project, to mitigate future harm that the new project is likely to cause. Instead, the Wirtzes are asking that the Commission reopen its FWEC proceedings to hold a hearing about prior harms. If the Wirtzes can prove at this hearing that FWEC has harmed them, the Wirtzes want the Commission to impose an additional requirement upon FWEC, demanding that it compensate the Wirtzes for their prior damages. Wisconsin’s Attorney General has advised the Commission that it cannot do so.

Years ago, the Wisconsin Attorney General published an opinion about the Commission’s authority to reopen and amend existing orders. In 29 Wis. Op. Att’y Gen. 101 (March 1, 1940), the Attorney General addressed a situation where the Commission had issued an order assigning a license to one contract motor carrier license, but long after the opportunity for a rehearing or judicial review of the order had expired, other competing motor carriers petitioned the Commission to reopen the proceedings. The Commission asked the Attorney General to examine the Commission’s authority to reopen cases and amend existing orders under Wis. Stat. § 196.39.²

In response, the Attorney General concluded, “[I]t is not perceivable wherein the commission would have power under this section of the statutes to make an order which would operate retrospectively and with respect to contracts completely executed under the prior order.”

² The relevant language of this statute today is virtually identical to the words of the law in 1940.

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29 Wis. Op. Att’y Gen. at 103. To demonstrate his logic, the Attorney General described a hypothetical situation where a public utility receives a Certificate of Authority under Wis. Stat. § 196.49 to construct a new plant. The Attorney General wrote:

The utility proceeds to and does construct the new plant, spending many thousands of dollars in reliance on the order of the commission. Could it be contended under such circumstances that . . . the commission has authority at any subsequent time in the future to reopen, alter and amend the prior order? A mere statement of the case, it seems to us, shows the unsoundness of any such intention.

29 Wis. Op. Att’y Gen. at 104. The Attorney General concluded that the Commission’s authority to reopen and amend should be limited to orders in which the agency has a continuing function.

The same limitation applies to any CPCN issued by the Commission. The Commission does have authority under Wis. Stat. §§ 196.395 and 196.491 to impose conditions when it issues a new CPCN, and it exercised that authority when it ordered FWEC to compensate landowners for crop losses. But the Wirtzes are requesting the Commission to modify a previously issued CPCN decision where the applicant has relied upon the decision, entered into contracts, expended funds, and completed the approved project.

The holdings of the supreme court, the opinion of the Attorney General, and the legislature’s intent, as shown in Wis. Stat. § 801.02(1), all support the conclusion that circuit courts are the appropriate forum to hear the Wirtzes’ Complaint, not the Commission. For these reasons, the Commission denies the Wirtzes’ request for a hearing under Wis. Stat. § 227.42 and declines to open a new docket.

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Right to intervene in the FWEC docket

The Wirtz family next claims that Wis. Admin. Code § PSC 2.21(1) grants it the right to intervene in the FWEC proceeding, docket 9300-CE-100. That rule provides:

PSC 2.21 (1) INTERVENTION BY RIGHT. A person whose substantial interests may be affected by the commission's action or inaction in a proceeding shall be admitted as an intervenor.

The FWEC proceeding is still technically open because Forward Energy LLC is conducting some required post-construction bird and bat studies. Even so, the Wirtzes do not meet the standards for intervention under Wis. Admin. Code § PSC 2.21(1). Contrary to the requirements of that rule, the alleged injury depends not on any action or inaction the Commission could now take. The injury that the Wirtzes are alleging occurred in the past and was related to the Commission's decision five years ago to grant a CPCN.

In the alternative, the Wirtzes assert that the Commission should grant them permissive intervention under Wis. Admin. Code § PSC 2.21(2). This rule states:

PSC 2.21 (2) PERMISSIVE INTERVENTION. A person not satisfying the criteria of sub. (1) may nevertheless intervene in a proceeding or docket if the person's participation likely will promote the proper disposition of the issues to be determined in the proceeding or docket and if the person's participation will not impede the timely completion of the proceeding or docket.

The Wirtzes assert that they meet the terms of this rule because the only remaining issues to be determined in the proceeding or docket relate to compliance, and their participation will promote the proper disposition of these issues without impeding the timely completion of the docket. In particular, the Wirtzes argue that their participation in the FWEC docket "would promote the proper disposition of the issue of Invenergy's compliance with the Commission's requirement

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that the company work with residents suffering from noise and mitigate those effects by offering evidence of the effects upon them.”

The Wirtz family is challenging FWEC’s compliance with a specific condition of the Final Decision. The Complaint cites one portion of the Final Decision, which reads: “Some members of the public who appeared at the Commission’s public hearings do raise concerns about individual hardships. **Forward is directed to work with those residents who testified regarding their particular potential adverse health and safety consequences**, and to the extent practicable to mitigate these effects for Mr. John Immel and Mr. John Panzer.” (Emphasis added.) While neither Jason nor Ann Wirtz provided oral testimony at a Commission hearing, Jason Wirtz did submit testimony in the form of written comments. The concerns he raised, though, do not address health and safety except for his desire to protect pilots at a local airstrip so they have “the maximum amount of clearance when maneuvering their aircraft around these towers.” Because his testimony is focused on airplane safety, even if the Commission were to open a proceeding about FWEC’s compliance with the Final Decision it would not be addressing the injury that the Wirtzes now claim. For these reasons the Commission rejects the Wirtzes’ demand to intervene in docket 9300-CE-100.

Hearing in the Ledge Wind docket

Finally, the Wirtz family contends that it has a right to be heard in the Ledge Wind application review, docket 9554-CE-100. Ledge Wind Energy LLC is still compiling its CPCN application for this Brown County project. The Commission has not yet determined that a Ledge Wind CPCN application is complete, nor has it issued a Notice of Proceeding. Any request to intervene in the Ledge Wind docket is therefore premature. Invenenergy LLC also contends that

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the Wirtzes lack standing to pursue intervention. The Wirtzes, though, explain that they have not requested to intervene in the Ledge Wind docket. They correctly note that non-parties (such as members of the public) have the right to raise issues in a CPCN docket, issues that the Commission can address and resolve. Rather than intervention, the Wirtzes want the Commission to hold “a hearing on their claim for compensation in the context of the Ledge Wind proceeding.”

Assuming that the Commission does declare the Ledge Wind CPCN application complete and holds a CPCN hearing, at such a hearing it could accept testimony from the Wirtzes as members of the public about their experience in the FWEC project area.³ The question of whether Forward Energy LLC, an affiliate of Ledge Wind Energy LLC, injured residents in a different wind farm project area may be relevant to the “individual hardships” standard in Wis. Stat. § 196.491(3)(d)3. For example, testimony from the Wirtz family might be part of a record that supports particular noise limitations on the Ledge Wind project. But what the Wirtzes want is compensation for prior injury, an injury that they allege was inflicted by FWEC. Based on Wisconsin Supreme Court and Wisconsin Attorney General opinions, the Commission is not the appropriate forum to provide this relief. For these reasons the Commission denies the Wirtzes’ request for a hearing on their claim for compensation in docket 9554-CE-100.

³ The Wirtzes could not submit technical testimony or expert testimony on this subject, though, without intervening as parties and participating in the Commission’s technical hearing.

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IT IS HELD THAT:

The request for relief is denied.

Dated at Madison, Wisconsin, June 8, 2010

By the Commission:


Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

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PUBLIC SERVICE COMMISSION OF WISCONSIN
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**NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE
TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE
PARTY TO BE NAMED AS RESPONDENT**

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.⁴ The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

⁴ See *State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.